Filed 6/9/16 P. v. Lopez CA5



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DENNIS LYNN LOPEZ,<br><br>Defendant and Appellant. | F070450<br><br>(Kern Super. Ct. No. SC071755)<br><br>**OPINION** |

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Poochigian, J. and Franson, J.

## INTRODUCTION

Appellant/defendant Dennis Lynn Lopez filed a petition for recall of his third strike sentence pursuant to Penal Code[1] section 1170.126 (Proposition 36). The court denied the petition and found defendant was ineligible for resentencing because he was armed with a firearm during the commission of the underlying offenses. On appeal, his appellate counsel has filed a brief that summarizes the facts with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Defendant has submitted a letter brief. We have reviewed the issues raised by defendant and affirm.

## FACTS[2]

### Kern County Superior Court Case No. 71755

On July 7, 1997, at 11:05 p.m., California Highway Patrol (CHP) Officers McGary and Nabors stopped defendant for driving with an inoperable headlight. There were two young women and an infant in the car.

After contacting defendant, Officer McGary determined he was driving without a license, without automobile insurance, and without properly restraining the infant. McGary cited defendant for these infractions and issued a "fix-it" ticket for the headlight.

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] The factual statement is based on the preliminary hearing transcript from case No. 71755 and this court's nonpublished opinion, which affirmed his 1997 convictions, both of which were filed as exhibits by the prosecution as the "record of conviction" in opposition to defendant's petition for recall. At the hearing on the petition, defense counsel conceded these exhibits were the record of conviction, he did not submit the trial transcript, and the superior court relied on the exhibits to deny defendant's petition. (See, e.g., *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1338–1339.)

We have also reviewed the trial transcript, which was the basis for this court's nonpublished opinion, and which is also clearly part of the record of conviction.

After defendant signed the citations, Officer McGary informed him that his car was going to be impounded, and he and his passengers were free to leave. McGary called for a tow truck and instructed Officer Nabors to conduct an inventory search of the vehicle. Defendant voluntarily stayed at the scene. He walked approximately 20 to 30 feet to a payphone, where he apparently made a telephone call.

As defendant walked to the payphone, Officer Nabors began the inventory search and started filling out a CHP 180 form, the usual CHP procedure for conducting an inventory search subsequent to an impound. Officer McGary testified the procedure required officers to "go through the vehicle for the purpose of locating any items of value which can be documented on our CHP Form 180." He also stated that a search of the engine compartment was customary pursuant to CHP Form 180.

After Officer Nabors completed an inventory of the passenger and trunk areas, he reached into the driver's side of the car and pulled open the latch for the hood. A loud "clunking" sound was made when the hood latch was released. Immediately thereafter, Officer McGary noticed defendant sprint away; defendant's passengers did not leave the scene. The officers did not immediately pursue defendant because they did not know why he was running.

Officer Nabors looked under the hood and found a sawed-off shotgun in the engine compartment, lodged behind the radiator. There was duct tape wrapped around the shotgun's handle. Nabors pulled out the gun by holding the duct-taped handle. Defendant was already "quite a distance away" when the officers found the shotgun. The officers quickly secured the shotgun in the trunk of the patrol car. They pursued defendant, but he eluded them. He was later apprehended and arrested.

At the preliminary hearing, Officer Nabors testified the engine compartment was not dusted for fingerprints. At trial, the following stipulation was read regarding fingerprint analysis of the shotgun: "It is stipulated by the attorneys that the firearm seized in this case was submitted to the Kern County Sheriff's Department Technical

Investigation Section for fingerprint analysis. The tape on the stock of the gun was analyzed, and no usable fingerprints were located. The rest of the gun was not analyzed for fingerprints, because it was not handled by officers in a way to preserve any fingerprints."

**Charges, Plea, and Sentence**

Defendant was charged with count I, possession of a firearm by a felon (former § 12021, subd. (a));[3] count II, possession of a short-barreled shotgun (§ 12020, subd. (a)); and count III, misdemeanor driving without a valid license (Veh. Code, § 12500, subd. (a)). It was further alleged he had two prior strike convictions and served two prior prison terms.[4] Defendant pleaded not guilty.

Prior to trial, defendant filed a motion to suppress and argued the inventory search was illegal and violated the Fourth Amendment. The court conducted a hearing and denied the motion.

On December 10, 1997, after a jury trial, defendant was convicted of counts I and II, and the prior conviction allegations were found true. Defendant pleaded no contest to count III.

On January 7, 1998, defendant was sentenced to the third strike term of 25 years to life for count I, plus two years for the prior prison term enhancements. The court stayed the third strike term for count II and imposed a concurrent term for count III.

On August 27, 1999, this court affirmed defendant's convictions in a nonpublished opinion (*People v. Lopez* (Aug. 27, 1999, F029935) [nonpub. opn.]). We found the

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[3] Former section12021, subdivision (a)(1) was repealed as of January 1, 2012, but its provisions were reenacted without substantive change as section 29800, subdivision (a)(1). (*People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2.)

[4] The information for case No. 71755 is not part of the instant record. According to defendant's petition for recall, his prior strike convictions were for assault with a deadly weapon in 1989 (§ 245, subd. (a)(1)); and second degree robbery in 1992 (§ 212.5, subd. (b)).

suppression motion was properly denied and the inventory search was reasonable; the court did not abuse its discretion to admit evidence of defendant's flight; the jury was properly instructed with the flight instruction; and the reasonable doubt instruction was constitutional.

**Petition for Recall**

On August 5, 2014, defendant filed a petition in the superior court for recall of his third strike sentence imposed in case No. 71755, pursuant to section 1170.126. Defendant argued he should be immediately released pursuant to the provisions of Proposition 36 because his third strike conviction for being a felon in possession of a firearm was not a serious or violent felony, and he did not fall within any of the exclusionary categories.

On August 19, 2014, the district attorney's office filed opposition and argued defendant was ineligible for resentencing under Proposition 36 because during the commission of the 1997 felony offenses, he was armed with a firearm, and that factor excluded him from the provisions of the statute.

As noted above, the district attorney attached the preliminary hearing transcript from case No. 71755, and this court's nonpublished opinion that affirmed defendant's convictions, as exhibits to establish the record of conviction for the 1997 offenses.

On October 22 and 28, 2014, the court held hearings on the petition. Defense counsel argued the question of whether defendant was armed with a firearm should be submitted to a jury. The prosecutor objected to a jury trial and argued the court should resolve the matter based on the exhibits submitted as part of the record of conviction.

The court held defendant was not entitled to a jury trial on his petition for recall.[5] The court stated it had reviewed the preliminary hearing transcript and the appellate

[5] An inmate who files a petition for recall of his or her sentence does not have a Sixth Amendment right to a jury trial. (See, e.g., *People v. Bradford*, *supra*, 227

opinion for the 1997 conviction. It denied the petition for recall and found defendant was ineligible for resentencing because he "was clearly armed with a firearm," based on the evidence from the record of conviction.

On November 5, 2014, defendant filed a timely notice of appeal of the superior court's denial of his petition for recall.[6]

## DISCUSSION

As noted above, defendant's counsel has filed a *Wende* brief with this court on April 7, 2015. The brief also includes the declaration of appellate counsel indicating that defendant was advised he could file his own brief with this court. By letter on April 7, 2015, we invited defendant to submit additional briefing.

The instant appellate record contains a letter that defendant sent to his appointed appellate counsel, dated April 28, 2015. Defendant sent a copy of this letter to this court. While it is not in the form of a brief, defendant clearly wrote the letter after he read appellate counsel's *Wende* brief and raised several issues about the superior court's denial of his petition for recall. We address the contents of his letter.[7]

### Defendant's Contentions

In his letter to appellate counsel, defendant asserts counsel was ineffective because he failed to challenge the superior court's conclusion that he was armed with a firearm in

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Cal.App.4th at p. 1336; *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1303–1305; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1039.)

[6] The superior court's denial of a petition for recall is an appealable order. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 597.)

[7] In his letter, defendant complains to his appellate counsel that the "appellate court will merely provide a rubber stamp on your *Wende* brief, being that it's not the court's responsibility to review the record and raise arguments." To the contrary. Although one appellate court held the denial of a petition for recall was not subject to *Wende* review, that opinion was subsequently depublished. (*People v. Anderson* (2014) 229 Cal.App.4th 925, review den. and opn. ordered nonpub. Nov. 25, 2014, S222078.)

the commission of the 1997 offenses, and thus ineligible for resentencing under Proposition 36.

In the course of his letter, defendant asserts the underlying "controlling" offense was not a felony, but merely an "ordinance violation" which simply required a "fix-it" ticket. Defendant further asserts that appellate counsel should have challenged the superior court's finding that he was armed based on the several "facts" which are "a matter of the permanent record" – his fingerprints were not found on the sawed-off shotgun, the vehicle was "a recent 'used car purchase,' " the firearm was "extremely old and very rusty," and the firearm was found "in a common area which was accessible to anyone who decided to pop the hood." Defendant suggests an "enemy" could have set him up by placing the firearm under the hood of the recently purchased car, knowing that he had a prior felony conviction, and that appellate counsel should have raised these issues.

**Analysis**

As relevant to this case, an inmate is disqualified from resentencing under Proposition 36 "if, inter alia, '[*d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon*, or intended to cause great bodily injury to another person.' [Citations.]" (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051 (*Blakely*), italics added.) "A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively. [Citations.]" (*People v. Bland* (1995) 10 Cal.4th 991, 997, italics in original; *Blakely, supra,* 225 Cal.App.4th at pp. 1051–1052.) A third strike inmate "may be found to have been 'armed with a firearm' in the commission of his or her current offense, so as to be disqualified from resentencing under the Act, even if he or she did not carry the firearm on his or her person." (*People v. Superior Court* (*Martinez*) (2014) 225 Cal.App.4th 979, 984–985; *People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, 1013–1018.)

Defendant apparently asserts there was no evidence which connected him to the shotgun, and points to several "facts" which purportedly undermine the superior court's determination that he was armed with a firearm and thus ineligible for resentencing. To address this issue, however, we are limited to the record of conviction which was introduced to the superior court, consisting of the preliminary hearing transcript and the appellate opinion that affirmed defendant's conviction. (*Blakely, supra*, 225 Cal.App.4th at pp. 1048–1049.)

In any event, the record refutes defendant's recitation of these purported undisputed facts. First, he claims the underlying offense was merely an ordinance violation for which he received a "fix-it" ticket. Defendant was not convicted and sentenced to a third strike term for the vehicular violations. These violations led to the inventory search, which in turn revealed the sawed-off shotgun and resulted in his felony convictions. In affirming defendant's convictions, this court found the inventory search of the engine compartment was reasonable. (See, e.g., *United States v. Lumpkin* (6th Cir. 1998) 159 F.3d 983, 987–988; *United States v. Lewis* (8th Cir. 1993) 3 F.3d 252, 254.)

Next, defendant asserts his fingerprints were not found on the sawed-off shotgun. However, the record reflects that no usable fingerprints were found on the shotgun, not that defendant was excluded as the source of any fingerprints. According to the preliminary hearing transcript, the engine compartment where the gun was found was not tested for fingerprints. At trial, it was stipulated that no usable fingerprints were found on the tape wrapped around the shotgun's stock, and the rest of the gun was not analyzed.

Defendant further asserts the vehicle was "a recent 'used car purchase,' " the firearm was "extremely old and very rusty," and the firearm was found "in a common area which was accessible to anyone who decided to pop the hood." Defendant essentially contends there is no evidence he knew the shotgun was in the engine compartment. As explained in this court's opinion, the question of whether defendant knew the shotgun was under the hood was addressed at trial, primarily by the trial court's

decision to admit evidence that defendant ran from the scene when the officers found the shotgun, and that such conduct supported the flight instruction.

On appeal, this court rejected defendant's argument that his flight was irrelevant to the case. This court noted that defendant "stayed at the scene until the hood was opened but he then sprinted away, leaving his passengers, who remained at the scene, alone in the middle of the night."

> "We find the disputed evidence to be relevant because it tended in reason to prove a contested fact – that is, whether [defendant] had knowledge of the shotgun's presence in the engine compartment. [Citation.] [Defendant's] sudden departure in response to the 'clunking' sound of the car hood popping open tended to show he knew the officer would find the shotgun inside and that its discovery would likely lead to his arrest. Contrary to [defendant's] contention, his knowledge of the shotgun's presence – in other words, his consciousness of guilt – is indeed probative of an element of the charge of possession of the shotgun."

This court further noted that defendant claimed "the evidence that other people had recently used the car tended to show the shotgun might not have belonged to him. The resulting evidentiary conflict, the very stuff of trials, simply created a question of fact for the jury to consider."

> "Here, [defendant] was told his car was being impounded and he was free to leave. Instead, he chose to remain nearby, observing the officers searching his car. When an officer opened the hood of the car, [defendant] quickly departed, leaving his passengers alone at midnight. These facts support a conclusion that his apparent desire to remain in the vicinity of the stop ended abruptly when he realized the officers were about to discover a weapon in his car. This evidence was thus sufficient to warrant instructing the jury to determine whether [defendant] fled the scene, and if so, what weight to accord that flight. The jury was entitled to reasonably infer [defendant's] guilt from his flight."

We find defendant's challenges to the court's determination that he was armed with a firearm are not supported in the record. After independent review of the record, we find that no reasonably arguable factual or legal issues exist.

## DISPOSITION

The judgment is affirmed.